NO. 01-711

IN THE

SUPREME COURT OF THE UNITED STATES

RICKY BELL, WARDEN
Petitioner

VS.

DERRICK QUINTERO
Respondent

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

The Respondent asks leave to file the attached response in opposition to the petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis*.

The Respondent has been granted leave to proceed *in forma pauperis* in the following courts:

U. S. District Court for the Western District of Kentucky
United States Court of Appeals for the Sixth Circuit

The undersigned Counsel for Respondent was originally appointed by the U.S. Court of Appeals for the Sixth Circuit under the C.J.A. to represent the Respondent who is presently incarcerated and has been incarcerated for in excess of the past ten years.

PAUL L. WHALEN
Counsel for Respondent

No. 01-711

In The

Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

DERRICK QUINTERO
Respondent,

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL L. WHALEN
Attorney At Law
Counsel of Record
113 Ridgeway Avenue
Fort Thomas, KY 41075-1333
(859) 466-3450

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION..... .1

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED.....3

I. This Case Does Not Present An Important Constitutional Issue Which Warrants Review By This Court.....4

II. There Is No Conflict Among The Federal Courts Which Requires Resolution By This Court.....4

III. Response To Petitioner's "Reasons For Granting The Writ.....4

A. Petitioner Ignored The Sixth Circuit's Findings Of The Structural Nature Of The Tainted Jury.....4

B. There Is A Real Probability That But For Counsel's Unprofessional Errors The Result Of The Proceeding Would Have Been Different.....5

C. The Sixth Amendment Affords A Right To A Trial By An Impartial Jury To All Criminal Defendants.....5

Perceived Misstatements In The Petition.....6

Conclusion.....6

TABLE OF AUTHORITIES

CASES Page

Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992).....4
U.S. v. Cronic, 466 U.S. 648 (1983).....4
Strickland v. Washington, ...5
Quintero v. Bell, 256 F.3d 409 (6th Cir 2001).....5

OTHER AUTHORITIES:

KRS§ 520.040.....2,5
Sixth Amendment, U.S. Constitution.....5
KRS §503.030.....6

INTRODUCTION

Respondent Derrick Quintero respectfully requests that this Court deny the petition for writ of certiorari to review the judgment entered in this case by the U.S. District Court for the Western District of Kentucky and affirmed by the United States Court of Appeals for the Sixth Circuit. In dismissing this Petition, Respondent would have to be retried within 90 days in the Lyon (Ky.) Circuit Court as originally ordered by the U.S. District Court for the Western District of Kentucky.

Unlike most habeas claims, the Respondent Derrick Quintero prevailed in his pro se Petition for Habeas Corpus file with the Federal District Court for the Western District of Kentucky and affirmed with the assistance of counsel at the United States Court of Appeals for the Sixth Circuit.

Respondent generally agrees with Petitioner's Statement of the Case with the following exceptions.

a. Respondent's trial counsel failed to challenge for cause seven jurors who served on the jury in the case of Commonwealth v. Billy Hall, 88-CR-072(3) held on October 16, 1989. (Apx. pg. 33-36) It should further be noted that Respondent's trial counsel served as trial counsel for both Respondent and Billy Hall.

b. Respondent would object to the use of the word "confessed" on page 5 in the last paragraph.

c. Respondent also objects to the first full sentence on page 6 regarding the lack of jury instruction.

While it has not been stated by Petitioner, it is the belief of Respondent that had he received effective assistance of counsel there could have been acquitted or convicted of a lesser charge of Escape in the third degree (KRS 520. 040), which is a misdemeanor. Had the Respondent been convicted of a misdemeanor, he would not have been convicted of the being a PFO.

Respondent would like to emphasis that this issues has been reviewed by the Federal Courts on three levels, by the Magistrate Judge, U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit.

It will also be noted that the arguments contained in Petitioner's Petition are different than the ones tendered to the U.S. Court of Appeals for the Sixth Circuit.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I. **This Case Does Not Present An Important Constitutional Issue Which Warrants Review By This Court**

II. **There Is No Conflict Among The Federal Courts Which Requires Resolution By This Court**

III. **Response To Petitioner's "Reasons For Granting The Writ"**

I. This Case Does Not Present An Important Constitutional Issue Which Warrants Review By This Court

While the issues concerning a defendant's Sixth Amendment right to effective assistance of counsel is an important constitutional issue, this Court has already addressed the underlying issues of ineffective assistance of counsel and unbiased jury composition. Moreover, Petitioner fails to assert any important constitutional issues in its Petition that would warrant review by this Court.

II. There Is No Conflict Among The Federal Courts Which Requires Resolution By This Court

There is no doubt that Respondent's Sixth Amendment right to "an impartial jury" was violated. In the only other Circuit in which a similar situation existed, the U.S. Court of Appeals for the Eighth Circuit held that counsel was ineffective for failing to request removal for cause four jurors who had previously sat on a jury convicting a co-defendant for the same crime. Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992).

III. Response To Petitioner's "Reasons For Granting The Writ"

A. Petitioner Ignored The Sixth Circuit's Findings Of The Structural Nature Of The Tainted Jury

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. An impartial jury is one of the requirements to subject the prosecution's case to meaningful adversarial testing as envisioned in U.S. v. Cronic, 466 U.S. 648 (1983)

Within Petitioner's argument, he fails to note the Sixth Amendment error concerning Respondent's right to an impartial jury was a "structural error". The Court within the third to the last paragraph of its opinion stated:

> "Thus, with Quintero having satisfied the performance and prejudice prongs of Strickland, the district court correctly concluded the cause for the constitutional claim existed in the form of ineffective assistance of counsel. Furthermore, since the structural nature of the tainted error warrants a presumption of prejudice that is exempt from harmless error analysis, sufficient cause and prejudice exist for the district court to reach the merits of Quintero's procedurally defaulted Sixth Amendment claim." Quintero v. Bell, 256 F.3d 409 (6th Cir. 2001) p. 10, slip opinion.

It was not necessary for the U.S. Court of Appeals for the Sixth Circuit to consider a test for harmless error when there was a structural error, which undermined the entire trial process.

B. There Is A Real Probability That But For Counsel's Unprofessional Errors The Result Of The Proceeding Would Have Been Different

It is Respondent's position that had his counsel challenged the seven jurors "for cause" he might have either been found not guilty on both the charges for which he was convicted or at the worst, been convicted of a lesser included offense of Escape in the third degree (KRS 520.040) which is a misdemeanor. In any case he would not have been convicted of being a Persistent Felony Offender.

C. The Sixth Amendment Affords A Right To A Trial By An Impartial Jury

The Sixth Amendment applies to all criminal defendants regardless of guilt or innocence. A reading of the applicable portion of the Sixth Amendment to the U.S. Constitution states as follows:

> ...the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed,...

Innocent, guilty or those caught in-between are entitled to an impartial trial by jury.

Perceived Misstatements In The Petition

Pursuant to Supreme Court Rule 15, Respondent addresses misstatements found in the Petition.

Respondent believes that the statement on page 6 of the Petition within the Statement of the Case is incorrect. "...the trial court did not instruct the jury on the affirmative defense (threat of injury) because Quintero failed to prove an immediate threat of injury." The record below is void of any statement by the Court that Respondent failed to establish or otherwise prove the "choice of evils" defense as prescribed by Kentucky Revised Statute (KRS) § 503.030. This was an issue of fact, which should have been tendered to the jury and is another example ineffective assistance of counsel by Respondent's trial counsel.

CONCLUSION

Respondent Quintero respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

PAUL L. WHALEN
Counsel of Record
113 Ridgeway Avenue
Fort Thomas, Kentucky 41075-1333
(859) 466-3450/781-4004

Attorney for Respondent
Derrick Quintero